No. 03-339

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, *et. al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENTS OF THE COMMONWEALTH OF AUSTRALIA, THE SWISS CONFEDERATION AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, originally enacted in 1789, created an implied Federal cause of action in U.S. district courts for aliens, wherever resident, to recover for torts "committed in violation of the law of nations or a treaty of the United States," even where the tort was committed by a non-resident alien outside the United States and had no substantial effect within the territorial (or admiralty) jurisdiction of the United States.

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INTEREST OF THE *AMICI CURIAE* [1]

The Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland, (hereinafter collectively, "the Governments") are committed to the rule of law as an essential part of an international civil society and a global

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* made any monetary contribution to its preparation or submission. The written consents of petitioner Sosa and respondent Alvarez-Machain to the filing of this brief have been filed with the Clerk.

trading and investment system. They are also committed to the promotion of, and protection against violations of, human rights. But the Governments are opposed to broad assertions of extraterritorial jurisdiction over aliens arising out of foreign disputes because such litigation can interfere with national sovereignty and impose legal uncertainty and costs. While the Governments recognize that those who commit human rights violations should be held accountable, they believe that any broad assertion of jurisdiction to provide civil remedies in national courts for such violations perpetrated against aliens in foreign places is inconsistent with international law and the practice of other nations and may indeed undermine efforts to promote such rights and their protection.

The Governments provide full access to an independent judiciary as the means for their nationals and others subject to their jurisdiction to vindicate their legal rights and to recover just compensation for legal wrongs. The Governments are concerned that an expansive reading of jurisdiction by one country will undermine the policy choices made by other sovereign nations with regard to the proper vindication of rights and redress of wrongs.

The *Sosa* case (03-339), and numerous other cases pending in the lower courts, involve the novel assertion that U.S. courts have a broad charter, based on claims by alien plaintiffs wherever resident, to define "the law of nations" and to impose civil liabilities under U.S. law on foreign defendants for foreign activities that have no effect in the United States. Such a doctrine tends to interfere with the sovereignty of the Governments and other sovereign nations by subjecting their nationals and enterprises to (i) risk of conflicting legal commands and proceedings, and (ii) the costs and uncertainties of defending themselves against private lawsuits under ambiguous or unacceptable rules of law in a foreign forum. Moreover, if the practice of

the courts below were to be copied by other nations, the harm done to the amici and to the United States would be compounded.

This case offers the Court a clear opportunity to put to rest the mounting international uncertainty surrounding the Alien Tort Statute ("ATS") and thus minimize the potential conflict with other sovereigns that arises from assertion of jurisdiction under that statute.

The issues here reflect part of a broader and recurring concern by the developed countries with extraterritorial exercises of prescriptive jurisdiction by the U.S. Congress.[2] Further to this end, the United Kingdom intends to participate as an amicus curiae on a related issue of prescriptive jurisdiction in *Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, No. 03-724 (involving extraterritorial jurisdiction over foreign transactions under the U.S. antitrust laws).

ARGUMENT

I. U.S. LAW MUST BE CONSTRUED TO BE CONSISTENT WITH INTERNATIONAL LAW AND TO MINIMIZE CONFLICTS OF JURISIDICTION.

A. Basic Principles

It is a bedrock principle of international law that each sovereign Nation is equal and entitled to prescribe laws and to adjudicate claims regarding those persons within its sovereign territory. U.N. CHARTER art. 2, para. 1. *See also The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of

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[2] *See, e.g.*, July 15, 2003 Statement by Mr. Mike O'Brien, Minister for Trade and Investment, United Kingdom (expressing concern of the British Government about unwarranted assertions of extra-territorial jurisdiction in commercial cases), *available at* http://www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030715/wmstext/30715m05.htm#30715m05.html_spmin3.

general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another").[3] Where jurisdiction is claimed by more than one sovereign state, the states exercising extra-territorial jurisdiction should do so in such a way that it is compatible with the exercise of jurisdiction by other states. An unwarranted assertion of jurisdiction may infringe the rights of another state to regulate matters that take place within its territory.

International law recognizes that the various grounds on which jurisdiction may be asserted are "parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states". Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, at 457-8 (9th ed. 1992).

The primary basis for jurisdiction under international law is territorial: each state may regulate activity that occurs in its own territory (the "territorial principle") and may extend the application of their laws to their citizens, wherever located (the "nationality principle"). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (hereinafter,

[3] Such a principle has importance beyond the mere adjudication of disputes but applies to the entire field of foreign relations among sovereign states. As one commentator has explained, "[t]he legal rules and principles governing jurisdiction have a fundamental importance in international relations, because they are concerned with the allocation . . . of competence to regulate daily life—that is, the competence to secure the *differences* that make each State a distinct society." Vaughan Lowe, *Jurisdiction*, in INTERNATIONAL LAW 329, 330 (Malcolm D. Evans ed., 2003) (emphasis in original).

"RESTATEMENT") § 402(1) (1987).[4] *See also* Lowe, *supra* note 2, at 339 (recognizing a state's application of its laws to citizens who have the nationality of the state, wherever they may be, as well as the assertion of territorial jurisdiction); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921 (D.C. Cir. 1984) ("the territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power").

Meanwhile, the sometimes controversial "effects doctrine" (developed primarily in the field of antitrust law) may allow a state to assert prescriptive jurisdiction over events that have a clear effect in its territory, even if all planning and execution took place elsewhere. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Gencor Ltd. v. Commission of the European Communities*, Case T-102/96, 1999 E.C.R. II-753. *See generally* RESTATEMENT § 402(1)(c) ("a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory"); §403(2) (jurisdiction based on "the extent to which the activity . . . has substantial, direct, effect upon or in the territory").[5]

[4] U.S. courts rely on the RESTATEMENT as setting forth the "principles, derived from international law, for determining when the United States may properly exercise regulatory (or prescriptive) jurisdiction over activities or persons connected with another state." *See, e.g., United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 11 (1st Cir. 1997) (Lynch, J., dissenting), *cert. denied*, 522 U.S. 1044 (1998). *See also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 421 n.3 (2001) (citing RESTATEMENT on issue of waiver of immunity from jurisdiction).

[5] The U.S. appears to recognize extra-territorial jurisdiction in other situations. *See, e.g.*, RESTATEMENT § 402(1)(d) (where necessary to protect the security of the state), but in each instance there is necessarily some connection between the activities or actors and the United States.

International law recognizes universal criminal jurisdiction in a few cases involving heinous crimes or piracy (*see* Lowe, *supra* note 2, at 343) (exploring instances of universal jurisdiction and justifications therefore); *see also* RESTATEMENT § 404 (recognizing that a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern).[6] International law does not, however, recognize universal *civil* jurisdiction for any category of cases at all,[7] unless the relevant states have consented to it in a treaty or it has been accepted in customary international law.[8]

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[6] *But see* Stefaan Smis & Kim Van der Borght, *Introductory Note to Belgium's Amendment to the Law of June 16, 1993 (as amended by the Law of February 10, 1999) concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 I.L.M. 740, 742 (2003) ("[u]niversal jurisdiction for serious international crimes . . . . is an area of international law in development. However, these developments in international law have neither been consolidated in a comprehensive treaty nor crystallized into clear customary rules" (footnotes omitted)).

[7] *Cf.* RESTATEMENT §404, cmt. b. ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy"). *See also Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980). Note, however, that neither the Restatement nor *Filartiga* cite any case in support of this principle. Moreover, the potential for "universal jurisdiction" in piracy cases does not detract from the lack of international acceptance of universal jurisdiction in a broader category of civil cases because piracy generally has not been an offense that took place on the territory of any sovereign nation and hence has not raised the types of issues currently being raised by the divers ATS cases.

[8] There have been a number of conventions or other agreements establishing crimes that are subject to universal jurisdiction. *See* examples listed in RESTATEMENT § 404 rep. n.1. A recent example of broader jurisdiction based on a treaty is found in the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified as a note to 28 U.S.C. § 1350 (hereinafter "TVPA"), passed by Congress to implement, in part, the Convention Against Torture and Other Cruel,

Absent the recognition of universal jurisdiction for a particular matter (e.g., piracy), there is no basis in international law for the creation of an *explicit* U.S. civil cause of action involving disputes among aliens, wherever domiciled, based on foreign activities that have no effects within the United States. There is even less reason to assume that Congress would have created an *implied* cause of action that would be inconsistent with the developments in customary international law. *Cf. Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("'[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains'"), *quoting Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Consistent with this idea, this Court has generally limited implied prescriptive extraterritorial subject matter jurisdiction to legislative prohibitions of "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford*, 509 U.S. at 796. The reason is simple: a more expansive assertion of jurisdiction risks the potential for international conflict. Thus, the Court has often invoked the "long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'. . . . It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 284 (1991), *quoting Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), which had been ratified by the United States. The TVPA is contrasted with the Ninth Circuit's position on the ATS in Section IV below.

B. Potential Conflicts among Sovereigns

The greatest potential for international conflict comes when one country enacts a legal rule and provides a forum to settle disputes between citizens of another nation under a legal rule which that other nation regards as infringing its sovereignty or as otherwise offensive. *See e.g., Virgin Atl. Airways Ltd. v. British Airways PLC,* 257 F.3d 256 (2d Cir. 2001) (concerning landing slots at London's Heathrow and Gatwick airports). Indeed, the U.S. and other countries (including the U.K.) had been involved in another disagreement over the broad application of a law based on "universal jurisdiction" in a forum that had no connection with the activities alleged. In 1993, Belgium passed the *Act Concerning the Punishment of Grave Breaches of International Humanitarian Law.*[9] This law allowed Belgian courts to hear war crimes cases regardless of where the crimes allegedly occurred or the nationalities of those involved. In 2003, the Belgian Government agreed to drastically amend the law in response to strong protests from the U.S. and others.[10]

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[9] June 16, 1993, amended February 10, 1999, translated and reprinted as amended in 38 I.L.M. 918 (1999), amended April 23, 2003, translated and reprinted at 42 I.L.M. 749 (2003), amended August 7, 2003, translated and reprinted at 42 I.L.M. 1258 (2003).

[10] *See* Smis & Van der Borght, *supra* note 6, 42 I.L.M. at 745 ("strong pressures from Israel and the United States have led to a decision of the incumbent Belgian Government to introduce a new series of amendments that require a clear link with Belgium before a Belgian court can accept jurisdiction"). Criminal complaints were filed against former President Bush, Prime Minister Tony Blair and others under the law as it stood pre-amendment. Very recently, the High Court of Belgium dismissed a complaint against U.S. General Tommy Franks for conduct during the current conflict in Iraq in light of the 2003 amendments to the law. *See* Constant Brand, *War Crimes Complaint Against Franks Tossed,* Washington Post, Jan. 14, 2004, *available at* http://washingtonpost.com/wp-dyn/articles/A17388-2004Jan14.html.

Modern history is full of important differences between the United States and its major trading partners over the extra-territorial application of U.S. law. *See* Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extra-territorial Jurisdiction,* 6 Geo. Mason L. Rev. 505 (1998). Indeed, the U.S. was a leader in an expansive application of its antitrust laws under the "effects doctrine" to foreign parties engaged in foreign activities. One of the most visible U.S.-U.K. differences on this point arose out of the attempts by private U.S. plaintiffs to sue foreign uranium producers for entering into a government-supported cartel that was a partial response to a U.S. Government ban on imports. The ultimate result was the enactment of the Protection of Trading Interests Act of 1980 by the U.K. Parliament, 1980 ch. 11, and an important House of Lords decision against the leading U.S. plaintiff. *Rio Tinto Zinc v. Westinghouse Electric Corp.,* [1978] W.L.R. 81 (H.L. 1977). Importantly, the assertion of U.S. jurisdiction was based on the "effects doctrine", even though it was the U.S. Government that had blocked uranium imports. *See, e.g., In re Uranium Antitrust Litigation,* 617 F.2d 1248, 1253-54 (7th Cir. 1980).

The present case is even more troubling. The Ninth Circuit's formulation of the ATS requires no connection with the U.S. other than as the place for the lawsuit. The formulation applies U.S. law (including punitive damages) without any need to show: (a) any act within U.S. territorial or admiralty jurisdiction, (b) any effect on U.S. commerce, and (c) any effect on a U.S. citizen. *Cf.* RESTATEMENT §403 (indicating bases for exercise of jurisdiction when there is conflict with assertion of jurisdiction by another country).[11] Yet such a broad exercise of extraterritorial jurisdiction

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[11] In the context of criminal jurisdiction, the Belgian "war crimes" law (discussed at text preceding note 9, above) has been amended to allow actions only if the victim or defendant is a Belgian citizen or long-time resident at the time of the alleged crime. 42 I.L.M. 1258.

creates a number of risks in the international sphere. Apart from the risk that such exercises may violate international law or the forum's treaty obligations, there is a real risk that a broad assertion of jurisdiction will offend the sovereignty of other nations. There is also a substantial risk that a broad claim of jurisdiction will disrupt trade and investment in a global economy.[12]

II. THE COURT OF APPEALS ERRED IN FINDING THAT CONGRESS HAD CREATED AN IMPLIED FEDERAL CAUSE OF ACTION THAT WOULD ALLOW ALIENS TO SUE OTHER ALIENS FOR FOREIGN CONDUCT THAT HAD NO EFFECT IN THE UNITED STATES BECAUSE THE "LAW OF NATIONS" HAD BEEN ALLEGEDLY INFRINGED.

A. The Basic Error

The *Sosa* appeal involves a dispute in a U.S. court under U.S. law between two Mexican citizens then resident in Mexico concerning conduct in Mexico that the plaintiff alleges was a tort committed "in violation of the law of nations". Upholding this claim, the en banc majority of the Court of Appeals for the Ninth Circuit ruled that the ATS "not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations. . . . In other words, '[n]othing more than a violation of the law of nations is required to

[12] The risk of such litigation may also deter investment in developing countries, contrary to the policies of the Governments filing this brief and other nations, including the United States, designed to encourage such investment. *See* October 27, 2003 Letter from William H. Taft, IV, Legal Adviser, Department of State, to Shannen W. Coffin, Deputy Assistant Attorney General, Civil Division, U.S. Dept. of Justice, at page 3, filed *In re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y. 2003), attached hereto at Appendix A (hereinafter, "Taft Letter").

invoke [the ATS].'" Pet. App. 11a, *quoting Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1476 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Mexico's potential interest in enforcing its own laws concerning internal disputes was outweighed by "the policy of the United States, as expressed in the [ATS], to provide a remedy for the law of nations." *Id. at* 59a.

The Ninth Circuit committed fundamental error in determining that the ATS creates a Federal cause of action to settle foreign tort claims under U.S. law where the parties are foreign and there is no conduct or effect from the conduct in the United States.

The Ninth Circuit decision below seems to stand for the proposition that, if a nation is providing a remedy for some violation of "the law of nations", it may ignore the jurisdictional limits placed on sovereigns by "the law of nations". International law limits the circumstances in which a sovereign can exercise *prescriptive jurisdiction* (i.e., jurisdiction to legislate) over activities outside its territory, especially where those activities have no effects within the jurisdiction of the legislating sovereign. *Cf.* RESTATEMENT §§ 402, 403. By interpreting the ATS to invoke "universal jurisdiction" without the support of either treaty or customary international law, the Ninth Circuit's action itself runs contrary to the "law of nations". Moreover, both the substantive violation and the apparent jurisdictional reach of the ATS implied by the Ninth Circuit go beyond any vision of "the law of nations" that could have been understood by Congress in 1789 (as explained in Section III below).

B. The Decision's Broad Potential Reach

The decision below has broad ramifications going beyond the highly particular facts of the *Sosa* case. This is not the only time that the Ninth Circuit has applied the ATS in this way; and it has been joined by the Second and apparently the

Eleventh Circuits in doing so. Recognizing the broad-ranging implications of these expansive appellate readings of the ATS, U.S. lawyers have been assembling foreign plaintiffs to make ATS class action claims in Federal courts for foreign activities concerning "human rights violations" in foreign countries. These claims often implicate activities of governments in their own territories and thus can involve difficult political, diplomatic and legal issues. The reported cases include allegations of:

i. Terrorist acts,[13]
ii. Apartheid wrongs,[14]
iii. Environmental violations and related personal injury claims,[15]
iv. Wartime reparations claims,[16]
v. Child labor violations,[17]
vi. Forced labor,[18]
vii. Expropriation[19] and misappropriation[20] of property,

[13] *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 811 (1985).

[14] *See, e.g., In re South African Apartheid Litigation*, 238 F. Supp.2d 1379 (J.P.M.L. 2002).

[15] *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Sarei v. Rio Tinto PLC*, 221 F. Supp.2d 1116 (C.D. Cal. 2002) (complaint further alleged that environmental damage and personal injury incited a civil war), *appeal docketed*, Nos. 02-56256, 02-56390 (9th Cir.).

[16] *See, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003); In *re Austrian and German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001).

[17] *See, e.g., Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 105 (2003).

[18] *See, e.g., Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3373 (U.S. Nov. 20, 2003) (No. 03-741); *Bao Ge v. Li Peng*, 201 F. Supp.2d 14 (D.D.C. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424 (D.N.J. 1999).

[19] *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

viii. "Cultural genocide",[21]
ix. Murder and denial of rights to organize union activity[22]
x. Imprisonment and torture,[23]
xi. Racial discrimination, degrading treatment, and loss of enjoyment of political rights.[24]

The question is not whether these challenged activities are an appropriate source of international concern. Of course, they are—but they may not constitute a violation of the "law of nations" unless state involvement in the wrongdoing is shown.[25] Moreover, the solutions to such state-oriented wrongdoing may be multilateral co-operation or bilateral diplomatic action, rather than a national judicial process. In contrast, where individual malefactors are involved, the international community generally treats egregious human rights violations as *crimes* to be punished by domestic or international tribunals (as discussed in Section I above), rather than *torts* to be remedied primarily by damage awards in civil proceedings. Thus the question at bar is whether a unilateral assertion of U.S. civil jurisdiction against individuals or corporations is a legally acceptable (or even a fair and practical) way of dealing with foreign "human rights

[20] *See, e.g., Hamid v. Price-Waterhouse*, 51 F.3d 1411 (9th Cir. 1995), *cert denied*, 516 U.S. 1047 (1996); *Bodner v. Banque Paribas*, 114 F. Supp.2d 117 (E.D.N.Y. 2000).

[21] *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003).

[22] *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp.2d 1345 (S.D. Fla. 2003); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp.2d 1250 (N.D. Ala. 2003).

[23] *See, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988); *Filartiga*, 630 F.2d at 877-81.

[24] *See, e.g., Tachiona v. Mugabe*, 234 F. Supp.2d 401 (S.D.N.Y. 2002).

[25] *See Tel-Oren*, 726 F.2d at 776, 791-94.

violations" that have no significant effect within the United States and do not necessarily involve U.S. nationals as plaintiffs or defendants.

C. Conflicts, Unfairness and Litigation Difficulties

The Ninth Circuit's implied cause of action under the ATS creates enormous potential conflicts with other sovereigns exercising traditional territorial jurisdiction and bearing political responsibility for addressing domestic concerns. See Section IV, below.

The difficulty does not stop there. States are the primary objects of public international law, the body of law on which human rights violations generally rest. Sovereign immunity applies to governmental entities charged with ATS violations. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (foreign governments exempt under the Foreign Sovereign Immunities Act of 1976). *See also Joo,* 332 F.3d at 680-87(sovereign immunity applied to claim against Japan for slavery during World War II); *Industria Panifacdora, S.A. v. United States,* 957 F.2d 886 (D.C. Cir. 1992) (sovereign immunity for U.S. Government in ATS case), *cert. denied*, 506 U.S. 908 (1992). Thus, the main targets of modern ATS actions are necessarily individuals or enterprises which allegedly executed, assisted, conspired, or supported alleged governmental violations of "the law of nations". Thus, for example in the *South African Apartheid Litigation* (M.D.L. No. 1499), the Government of South Africa—appropriately—asserts its sovereign immunity, while several British, Australian and Swiss companies and numerous companies from the U.S. and elsewhere are the defendants left defending themselves against charges that they facilitated the former South African Government's well-entrenched Apartheid policies.

Civil litigation against private parties for the acts of a foreign government is teeming with practical problems and

potential unfairness to the defendants. These concerns are heightened where the private party defendant happens to be foreign and the government is absent because it is immune. Yet, this is precisely the structure of many of the cases brought under the ATS, as interpreted by the Ninth and Second Circuits, because the foreign governments are the source of the types of human rights violations being alleged in the ATS class actions referenced above. Nevertheless, it is enterprises and even individuals who are left defending themselves against an alleged "violation of the law of nations" by an exempt and absent government. Moreover, where the foreign government is not amenable to discovery directed by a U.S. court, the private party defendants face the difficult, if not impossible, task of showing that there was no "violation of the law of nations" by the foreign government or that the defendant was not part of any alleged violation.

III. THE ALIEN TORT STATUTE ("ATS") SHOULD BE READ IN THE CONTEXT OF ITS ORIGINS; AND AS SUCH WOULD NOT VIOLATE INTERNATIONAL LAW.

The ATS is but a single feature of the first Judiciary Act[26] in which Congress sought to establish a federal judicial system in response to Article III of the Constitution. Its origins are somewhat uncertain; it was of sufficiently minor importance that it did not generate any special explanation at the time of enactment. Thus the language in Section 9 that is now the ATS appears to have arisen from the desire in 1789 to protect foreign diplomats in the new U.S. Republic, and alien shipowners whose ships may have been improperly taken as prizes during wartime.[27]

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[26] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (1789).

[27] *Al Odah v. United States,* 321 F.3d 1134, 1148-49 (D.C. Cir. 2003) (Randolph, J., concurring) (scholarship suggesting that the "for tort only" language in the ATS was to deal with the situation where the owner of the

As noted above, the Ninth and Second Circuits' interpretation of the ATS as creating an implied cause of action has no basis in its origin. Moreover, it may be an assertion of universal prescriptive jurisdiction contrary to international law. This Court requires a more restrained approach (*see The Charming Betsy,* 6 U.S. at 118 ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .")).

There are several ways that the ATS could be construed to avoid a conflict under international law. The first course (urged by the Solicitor General) would be to treat the statute as simply jurisdictional—i.e., giving the Federal courts subject matter jurisdiction over suits brought by aliens for certain torts defined by common law, admiralty law or other statutes. Such a course would reject the existence of an implied Federal cause of action under the ATS.[28] The second course would be to limit any implied ATS cause of action to what Congress would have assumed in 1789—both about what constituted the "law of nations", but particularly about the limits on the extraterritorial exercise of legislative jurisdiction.

A. Subject Matter Jurisdiction Only

The Solicitor General asserts that, "[t]he plain language . . . and history of the ATS strongly suggest that the provision only establishes subject matter jurisdiction over a particular class of suit, and does not create a private right of suit." *Brief of the United States in Support of Petition,* at 16.

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improperly-seized prize was suing for reparations, rather than return of his ship which would have already been subject to Federal admiralty jurisdiction). In the early years of the Republic, aliens would bring several important cases against individual states for infringing alien property rights that were supposedly protected by the Treaty of Paris of 1783, but these were apparently not tort cases under Section 9.

[28] This position is supported by D.C. Circuit decisions discussed below.

This position is supported by extensive concurring opinions by two respected jurists in two separate D.C. Circuit Court of Appeals cases. *Tel-Oren,* 726 F.2d at 811 (Bork, J., concurring); *Al Odah,* 321 F.3d. at 1145 (Randolph, J., concurring).

The Solicitor General's position, if adopted by this Court, would resolve the international problem that is of such concern to the Governments.

B. Territorial Limits on Prescriptive Jurisdiction

When the ATS was enacted, the basis for asserting substantive or legislative jurisdiction was territorial. *See, e.g., Schooner Exchange v. M'Fadden,* 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself"). *See also American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356-57 (1909) (120 years after enactment of first Judiciary Act, Justice Holmes explained "the general and almost universal rule" was "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," *id.* at 356, but, when in doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

Hence the principal focus of Congress would necessarily have been on torts committed against aliens *within the United States or on the High Seas where no one country had jurisdiction.*

C. The "Law of Nations" as then Understood

Quite apart from jurisdictional coverage, it would have been entirely inconsistent with then-existing legal concepts for the first Congress to have (i) given the new federal courts

an open-ended mandate to define the "law of nations"[29] or (ii) created a broad, but unspecified, private cause of action based on such an undefined "law of nations".

The "law of nations", as understood in 1789, was a relatively limited concept. Twenty years earlier the scholar William Blackstone had explained: "The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries on the Laws of England*, 68 (1769), *quoted in Tel-Oren,* 725 F.2d at 813 ("a writer certainly familiar to colonial lawyers") (Bork, J., concurring). As Judge Bork notes, "[i]t is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover." *Tel-Oren,* 726 F.2d at 813.

D. So Little History, yet So Many Consequences

Neither Respondents nor the Ninth Circuit could seriously suggest that the first Congress could have contemplated, let alone have actually intended, the very broad civil action that the Ninth Circuit has implied from the enactment of Section 9 of the 1789 Act. Rather Respondent must contend that the ATS is one of those statutes where Congress intended to exercise its constitutional jurisdiction to the fullest extent and therefore the breadth of its statutory coverage should expand as the constitutional scope of federal jurisdiction expands. *See, e.g., United States v. South-Eastern Underwriters Ass'n,*

[29] Many members of the 1789 Congress and the first U.S. Administration, including Alexander Hamilton, had sat in the Constitutional Convention of 1787. They would have been familiar with both English law and Article I, Section 8, Clause 10 of the Constitution, which gave to Congress power to "define and punish...Offenses against the Law of Nations."

322 U.S. 533, 556-60 (1944). But Section 9 of the 1789 Act is hardly the Sherman Act (which was a major political event at the time of its enactment in 1890). Moreover, such an argument goes too far. An expansive reading of the 1789 Act to permit an implied statutory right of action would run contrary to international law and *The Charming Betsy* principle.

The better answer is the one given by this Court in an important admiralty decision some forty-five years ago. *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959). *Romero* raised the issue of whether federal question jurisdiction, first adopted in 1875, would support an attempt to bring a dispute between foreign parties into the U.S. courts under U.S. law. In rejecting such an expansive interpretation of federal question jurisdiction, the Court explained:

> "The history of archeology is replete with unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the [Judiciary] Act of 1875 was not uncovered by judges, lawyers or scholars for *seventy-five years* because it is not there."

Id. at 370-71(emphasis added).

This point must apply doubly to Section 9 of the Judiciary Act of 1789 which went almost *two centuries* before being unearthed as a broad, jurisdictionally unlimited sword, largely stemming from the Second Circuit's novel use of the Act in its *Filartiga* decision.

IV. THE UNITED STATES WOULD BE AT ODDS WITH THE LEGAL SYSTEMS OF OTHER NATIONS IF IT WERE TO ALLOW CIVIL SUITS FOR ALLEGED VIOLATIONS OF THE "LAW OF NATIONS" WITHOUT REQUIRING ANY NEXUS TO THE UNITED STATES.

A. Violations of Treaties and Customary International Law Do Not Create Private Rights of Action

As a matter of international law, violations of customary international law do not give individuals the right to bring civil claims in respect of those violations. We are not aware of any nation outside the United States, that currently accords individuals such a right. In addition, we know of no nation, let alone a major one, that seeks to exercise such unbounded civil jurisdiction over foreigners engaged in activities on foreign territory, absent a treaty obligation to do so.

Under U.S. law, treaties (or other international agreements) to which the United States is a party do not create enforceable private legal rights in the U.S. unless so stated in the treaty and the treaty is deemed to be self-executing. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled in part on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). *See also Ware v. Hylton,* 3 U.S. (3 Dall.) 199, 244-55 (1796) (Treaty of Paris created right to pursue collection actions on debts created before the Treaty, notwithstanding state laws to bar such actions).

Yet the Ninth Circuit has been willing to create the "law of nations", enforceable by private parties, out of unratified treaties or even a treaty that was ratified on the condition that "it 'will not create a private cause of action in the U.S. courts.'" *See Al Odah,* 321 F.3d at 1145-47 (Randolph, J. concurring), *discussing Martinez v. City of Los Angeles,* 141 F.3d 1373, 1383-84 (9th Cir. 1998). The fact that potential

human rights violations are involved does not justify jettisoning well-established international law on jurisdiction of national courts over civil litigation.[30]

It is instructive to contrast what the Ninth Circuit has attributed to Congress in the ATS with what Congress did over 200 years later in enacting the TVPA, 106 Stat. 73. The TVPA is an explicit exercise of extraterritorial jurisdiction based on the "universality principle". It provides for a damage remedy against "[an] individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in prohibited forms of torture (*Id.* at § 2(a)). The statute is, however, limited: "A court shall decline to hear a claim…if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim has occurred" (*Id.* at § 2(b)).[31] There is also a ten-year statute of limitations (*Id.* at § 2(c)). Moreover, this statute was passed by Congress to implement, in part, the Convention Against Torture and Other Cruel, Human or Degrading Treatment or Punishment, which had been ratified by the United States. S.Rep. No. 249, 102d Cong., 1st Sess., at 2-5 (1991).

B. An Assertion of Broad Jurisdiction May Lead Other Nations to Take Similar Positions

Finally it may be contrary to the United States' own interest to lead the way in asserting extraterritorial national jurisdiction over foreigners in areas not previously recognized by international law. As a celebrated writer and member of this Court, Joseph Story, observed:

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[30] The situation is different in the *criminal law* area, where international law has recognized *universal jurisdiction* for certain particularly heinous crimes.

[31] This contrasts with the failure of the U.S. courts to recognize an "exhaustion of remedies" concept in ATS cases. *See* discussion in text at note 36, below.

> "The true foundation on which the administration of international law must rest is, that rules which are to govern are those which arise from mutual interest and utility, from the sense of inconveniences which would result from a contrary doctrine, and from a sort of *moral necessity to do justice in order that justice may be done to us in return.*"
>
> Joseph Story, *Commentaries on the Conflict of Laws* 32-35 (2nd ed. 1841) (emphasis added).

Other nations might follow its lead, to the detriment of the U.S. and the general detriment of international law and order.

V. PRINCIPLES OF COMITY AND FORUM NON CONVENIENS SHOULD IN ANY EVENT BE APPLIED TO EXTRATERRITORIAL DISPUTES AMONG FOREIGN NATIONALS.

The Court of Appeals majority recognized that, "Mexico may in fact have competing interests—seeking to obtain compensation for its citizen, Alvarez, while limiting damages from Sosa, another of its citizens." Pet. App. 59a. However, the Court determined that Mexican law should not govern the dispute because of

> "[T]he policy of the United States, as expressed in the [ATS] to provide a remedy for the law of nations [citation omitted]. We agree with the district court that limitations on damages under Mexican law—including the unavailability of punitive damages—are not consistent with the congressional policy that underlies the [ATS]."

Id. at 59a (citation omitted)

Sovereign decisions on what legal rights, rules, and remedies should be available to its nationals and others injured by activities within its territory (or by its nationals) are important aspects of sovereignty that should be respected by U.S. courts under international law. Moreover, its judicial

or administrative processes are entitled to substantial deference under the doctrines of *forum non conveniens* and comity.

A. Differing Approaches of How to Define and Deal with Legal Wrongs

Substantial differences exist in the precise rules for defining torts in different common law and civil law systems. Some conduct may be legal in France, while it would be illegal in Australia, or vice versa. Some nations may impose statutory limits on tort damages, while others (particularly the U.S.) may allow tort damages that greatly exceed the plaintiff's actual losses in order to deter particular types of conduct. *But see State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408 (2003) (limiting punitive damages to awards having a reasonable relationship to compensatory damages). The point is not that one system is right and another is wrong; rather it is that tort rules and allowable recoveries are important legislative and judicial decisions that each sovereign should be allowed to make for its nationals and others within its jurisdiction.

It is not even necessary that all remedies for tort-like wrongs be judicial in nature. A responsible sovereign may prefer to have a political resolution that looks to the future rather than a backward-looking resolution based on litigation damages. Thus, *In re South African Apartheid Litigation,* MDL No. 1499, the post-Apartheid South African Government has taken the strong position that national reconciliation and any reparations to be made are fundamental political issues to be solved by South Africans using South African rules and institutions. As the President of South Africa has explained, "we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the

observance of the perspective contained in our constitutions of the promotion of national reconciliation."[32] This position has been strongly endorsed by the U.S. Department of State, which has emphasized: "the government [of South Africa now] pursuing these policies is broadly representative of the victims of the apartheid regime and [we] believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid."[33]

Moreover, a sovereign (or a group of sovereigns) may establish by legislation or treaty a specialized tribunal or dispute resolution procedures for resolving alleged human rights violations, e.g., European Court on Human Rights,[34] or the new International Criminal Court.[35]

In dealing with ATS cases, the Ninth Circuit has not shown any particular sensitivity to these practical realities. Thus, courts in the Ninth Circuit have not recognized an *exhaustion of local remedies* concept, as exists under international law.[36]

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[32] Address to Parliament by President Thabo Mbeki (April 15, 2003) quoted in the Declaration of the Honorable Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, the Court in MDL No. 1499 on July 1, 2003 (See Appendix B).

[33] *Taft Letter, supra* note 5 (expressing concern about the adverse effect on U.S. foreign policy of continued prosecution of the cases consolidated as *In Re South African Apartheid Litigation*).

[34] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 219 U.N.T.S. 222, 234.

[35] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (entered into force, July 1, 2002).

[36] *See Sarei,* 221 F. Supp.2d at 1132-39. The Defendant/Cross-Appellants in that case had urged the court to accept an exhaustion of local remedies rule as being required by international law. *See also* Rio Tinto Brief, Dkt. Nos. 02-56256, 02-56390 (9th Cir.). Should this "exhaustion of remedies" argument be successful, it would ameliorate, but not elimi-

Moreover, the Ninth Circuit has put aside the normal conflict of law rules because it has concluded that only the punitive damages available under U.S. law would be an adequate remedy against a violation of the "law of nations". Pet. App. 59a.

Even where a nation offers civil remedies to its residents for violations of the "law of nations" (or for human rights violations) that occur in its territory or on the High Seas, potential forum shopping is a practical issue. The U.S. has been a pioneer in developing rules that assist plaintiffs and hence it tends to attract litigation to the U.S. courts. These rules include:

- The U.S. does not have a "loser pays" rule on attorneys' fees and litigation costs that is the normal standard in the U.K., Australia and Switzerland and elsewhere.
- The concept of punitive damages is now largely confined to the U.S., but was a reason why the Ninth Circuit opted to apply the ATS rather than Mexican law. Pet.App. 59a.
- Large contingent fees for successful plaintiffs' counsel is a standard U.S. practice, but is much less accepted elsewhere.
- Class actions rules tend to be much more expansive in the U.S. than many other countries have been willing to allow. Such actions are particularly attractive to plaintiffs' counsel because they generate very large potential claims that can create heavy pressure on defendants to settle even doubtful claims. *See In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 147-59 (2d Cir. 2001)(Jacobs, J., dissenting), *cert. denied*, 536 U.S. 917 (2002).

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nate, the Governments' concern about the substantial potential adverse effects of the Ninth Circuit's acceptance of universal prescriptive jurisdiction in ATS cases

These procedural rules reflect political choices which the Federal Government and the U.S. States have made, and should be free to make. They become a matter of international concern only when combined with broad assertions of extraterritorial jurisdiction. This has clearly happened here, where ATS claims that involve foreign activities with no U.S. effect are brought into U.S. courts as class actions seeking to remedy an alleged violation of "the law of nations".

B. Comity and Forum Non Conveniens

In *Hartford*, this Court narrowly rejected comity as a consideration because the foreign conduct at issue was directed at the U.S. market, its principal effect was in the United States and foreign law did not require the defendants to engage in it. 509 U.S. at 797-9. In the ATS cases with which the Governments are most concerned (e.g., the *Apartheid* cases), there are no intended or actual effects in the U.S. and there is a general conflict with the foreign government over its policy vis-a-vis what is being sought in the U.S. under the ATS litigation. Therefore, if contrary to what we urge, the Court allows some implied right of action under the ATS, it should make very clear that comity and *forum non conveniens* principles apply.[37] Such cases would

[37] In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) *cert. denied*, 532 U.S. 941 (2001), the Second Circuit reversed the district judge's application of *forum non conveniens* to claims by three Nigerians of human rights abuses in Nigeria. The defendants were a Dutch and a U.K. company involved in oil exploration and production in Nigeria. The district judge had specifically found that the U.K. would be a more convenient place to conduct the litigation and that there were no U.S. connections to the matter indicating New York as the appropriate forum. *Id.* at 92. However, the Second Circuit held that the district court failed to accord sufficient weight to factors including two of the plaintiffs had become U.S. residents, the plaintiffs' choice of forum, and the interests of the United States in providing a forum for adjudication of human rights abuses. *Id.* at 101-07.

be a far cry from *Hartford*, which dealt with governmental conflicts in relation to conduct that clearly had an effect on markets in the United States.

Too much litigation can be a risk to investment and commerce, as many American states have increasingly been forced to recognize in the medical malpractice area; and this practical and economic reality argues strongly against having the United States generate substantial extraterritorial litigation risks which deter legitimate enterprises from engaging in business and investment in poorer nations whose residents' lives may be improved by the presence of such enterprises.

CONCLUSION

The Governments of Australia, Switzerland, and the United Kingdom are concerned that human rights violations be dealt with fairly and promptly in appropriate fora. The question in this case is whether the Ninth Circuit has come up with the right resolution in the right forum. More particularly, the question is whether an implied right of action under U.S. law based on extraterritorial jurisdiction over entirely foreign actors and situations is provided by the ATS or consistent with international law. The answer to both questions, we respectfully submit, is "no".

For the United States to create a Federal cause of action against foreign nationals for conduct in foreign lands would interfere fundamentally with other nations' sovereignty, complicate international and local efforts to halt and punish human rights violations, and thereby weaken the "law of nations" that the ATS was intended to uphold. Moreover, because the Governments believe that human rights are, in the long run, more likely to be protected by building stronger democratic and legal institutions, the availability of ATS litigation in the U.S. will likely undermine political efforts to foster development of the rule of law and good governance.

As global trading and investing nations, Australia, Switzerland and the United Kingdom are concerned not only about interference with their own domestic dispute-resolution choices, but also that their enterprises and individuals are likely to be threatened with large damage claims because they have carried on normal business activities in a country that a U.S. court believes has engaged in violations of the court's version of "the law of nations".

Accordingly, the Governments of Australia, Switzerland and the United Kingdom respectfully urge that the ATS be restricted to cases which (i) have an appropriate connection with the U.S or (ii) involve activities by U.S. nationals.

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January 23, 2004

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APPENDICES

APPENDIX A

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

October 27, 2003

Shannen W. Coffin
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3137
Washington, D.C. 20530

Re: In Re South. African Apartheid Litigation.
MDL No. 1499 (S.D.N.T.)

Dear Mr. Coffin:

I am writing in response to Judge John E. Sprizzo's letter of August 7, which is attached hereto, and request that the Department of Justice submit this response to the Court. Judge Sprizzo inquired whether the Department of State believes that adjudication of the above-captioned litigation would have an adverse impact on the interest of the United States and, if so, the nature and significance of that impact. The Department's views are set out below.

At the outset, I reiterate the long-standing opposition of the United States Government to, and its abhorrence of, the institution and practices of apartheid and our commitment to helping the people of South Africa overcome their tragic past.

With respect to litigation in U.S. courts by alleged victims of apartheid, an initial concern relates to the Alien Tort Statute, 28 U.S.C. § 1350, which we understand is a central basis for the current apartheid cases. The statute has been addressed by a number of court over the past two decades,

including the Second Circuit in *Filartiga v. Pena-Irala*[1] and *Flores v. Southern Peru Copper Corporation*.[2] The United States Government has a substantial interest in the proper interpretation and application of this statute because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the nation's foreign policy. The United States has recently taken the position in various pending cases that the Alien Tort Statute is a jurisdictional provision only and does not itself create any private causes of action. For the Court's convenience, I have attached a copy of the brief recently submitted to the U.S. Supreme Court by the United States in support of a petition for certiorari in *Sosa v. Alvarez-Machain* (No. 03-339).

More specifically with respect to the subject matter of the litigation, it is our view that continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States. The Government of South Africa has, on several occasions and at the highest levels, made clear its view that these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution. As Minister of Justice Maduna explained in his letter to the Court of July 11, 2003, the current Government of South Africa has taken extensive steps to promote reconciliation and redress for apartheid-era injustices. We note that the government pursuing these policies is broadly representative of the victims of the apartheid regime and believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid.

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[1] 630 F.2d 876 (2d Cir. 1980).

[2] 343 F.3d 140 (2d Cir. 2003).

Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's on-going efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.

Various other foreign governments, including those of the United Kingdom and Canada, have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants. In light of their strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic processes, we can anticipate possible, continuing tensions in our relations with these countries over the litigation.

We are also concerned that adjudication of the apartheid cases may deter foreign investments where it is most needed. The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters

such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.

We would be pleased to provide any additional information the Court may require.

Sincerely,

/s/ William H. Taft, IV
WILLIAM H. TAFT, IV

Enclosures:
As stated.

APPENDIX B

[Logo]

MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT REPUBLIC OF SOUTH AFRICA

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The Honourable Mr Justice John E Sprizzo
United States District Judge
United States Court House
500 Pearl Street
New York, New York 10007
UNITED STATES OF AMERICA

Dear Judge

(a) SOUTH AFRICAN APARTHEID LITIGATION (MDL NO.1499)

(b) KHULUMANI & OTHERS (CV 02 5952) '

I write to convey to the Honourable Court through my enclosed declaration the views of the Government of the Republic of South Africa regarding the South African apartheid litigation pending before the Court.

Respectfully yours

/s/ Dr. P M Maduna
DR. P M MADUNA, MP
Minister
Annexure

DECLARATION BY PENUELL MPAPA MADUNA

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbekl. I am an admitted attorney of the High Court of South Africa and hold the degrees of B. Juris, LL.B, LL.M as well as a LLD in constitutional law.

2. I make this declaration to set forth the South African government's ("the government") view of various cases pending in the United States courts against corporations that did business with and in South Africa during the apartheid period, including those cases consolidated under the caption, *In Re South African Apartheid Litigation,* MDL No. 1499 (S.D.N.Y.) and *In Re Khulumani & others*, CV 02 5952 (E.D.N.Y.) It is the government's submission that as these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed.

3.

3.1 By way of background, the Republic of South Africa is one sovereign democratiç state founded on the values of human dignity, equality, non-racialism, non-sexism, supremacy of the Constitution, and the rule of law, universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Under South Africa's 1996 Constitution, the Constitution is the supreme law of the Republic. Under the Constitutional, the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all

other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness and are frequently referred to in judgments of other final courts of appeal internationally.

3.2

3.2.1 The 1993 interim Constitution, which paved the way for South Africa's first democratic government in 1994, made provision for the establishment of a Truth and Reconciliation Commission (**"the TRC"**) in order to establish the truth in relation to **"past events"**, the circumstances under which gross violations of human rights occurred and to make such findings known. The purpose of the TRC was not simply to provide an account of the apartheid system, but to document gross violations of all human rights abuses, irrespective of their perpetrators, and to make provision for amnesty for those who made full disclosure of such politically-motivated human rights violations and to provide reparations for the victims of such abuses. In 1995, Parliament enacted legislation to establish the TRC formally. In taking these constitutionally-mandated steps, government deliberately avoided a **"victors' justice"** approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.

3.2.2 The 1993 Constitution and the Promotion of National Unity and Reconciliation Act, 1995, which established the TRC, was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation.

3.2.3 The TRC completed its work in March 2003. It-granted amnesty to many perpetrators of gross violations of human rights on a cross-party basis. It also recommended financial reparations for some 20 000 victims of such abuses. In his address to Parliament on 15 April, 2003, on the tabling of the TRC Report, President Thabo Mbeki on behalf of the government. observed that:

> **"In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.**
>
> **In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation".**

3.2.4 It is .my respectful submission that the government's views on .matters which fall within its sovereign domain should be respected in all forums.

3.3 I believe that it is Important for the court to understand the context in which these cases are brought. The litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system, which,

while formally and institutionally terminated by the election of the Mandela government on 27 April 1994, continue to live with us and will, unfortunately, continue to endure for many years to come. It likewise fails to appreciate the mandate under which South Africa's first democratic government was elected and how it has gone about executing this mandate since 1994. In order to assist the court, I set out briefly the details of this below.

4. In addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from proper participation in the economy. The African National Congress-led government, under the leadership of former President Mandela, was elected in 1994 by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid. The government's programme, based on the reconstruction and development of the South African economy, accordingly had and continues to have as its central plank the fundamental transformation of South African society. It does so by attempting to rehabilitate the lives of the previously disadvantaged through the promotion of non-racialism, equality and social justice. The implementation of this policy, as will be seen below, has been and continues to be achieved through wide-ranging legislative reforms to transform South African society. In other words, what the government is attempting to do is to repair the damage caused by the apartheid system through a broad programme of socio-economic reparations which has at its heart, the betterment of the lives of the previously disadvantaged.

5.

5.1 South Africa's 1996 Constitution, which the African National Congress was instrumental in drafting, gives effect to government policy to redress the wrongs of the apartheid system, by not only prohibiting all forms of discrimination, but also by guaranteeing the right of all South Africans to access to housing, education, health care and related social services. Under the Constitution, the government is obliged to meet these socio-economic rights within the limits of its resources. The central importance of these provisions of the Constitution is, however, transformative and redistributive, in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society. Although, the government has obviously not met all of its 1994 goals, its record, faced with the realities of a globalised economy is, I submit, impressive.

5.2 In education, the spending disparity on white and black learners (18:1 in 1970 was reduced to 3:1 by 1993) was eliminated by racially integrating schools while at the same time, directing the bulk of state expenditure to the neediest schools. In addition, free primary and secondary level education will be available to the poorest 40% of the population from 2004. Government remains committed to reducing adult illiteracy.

5.3 Skewed land ownership is being addressed through legislation which provides for the restitution of land taken from black South Africans under race-based legislation first introduced in 1913. Further laws provide for the redistribution, with state assistance, of some 30% of commercial farming land to emerging black farmers.

5.4 Social pensions (equalised prior to 1994) have now been extended to many more beneficiaries and supplemented by school feeding schemes, free medical treatment at state hospitals for pregnant women and children under the age of six, and a child support grant. Substantial Increases have been made in providing state financial support, especially to children, with more than eight million people expected to receive social assistance grants by 2005 compared with 2.7 million in 1997. Government is currently rolling out state financial support for children between the ages of seven and fourteen years, over a seven year period.

5.5 At the same time, government has adopted a range of legislative measures aimed at overcoming racial inequality, including the Employment Equity Act of 1998, and the Preferential Procurement Policy Framework Act of 2000. The vast bulk of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, came into effect on 16 June, 2003.

5.6 A good example of achieving majority participation in the economy is the Minerals and Petroleum Resources Development Act of 2002, which is due to come into force in late 2003. This vests all mineral rights in the state and grants new mining licences to applicants in return, among other things, for comprehensive endeavours to promote black economic empowerment. The objectives here include the transfer of ownership to black South Africans of at least 26% of equity or operating assets within ten years under a broad-based mining charter agreed with the South African mining industry. Likewise, a Black Economic Empowerment Bill, intended to promote black economic empowerment in other sectors through measures such as affirmative

action, preferential procurement, and equity transfer" in favour of black South Africans, is currently before the South African Parliament.

6. While the government's job is to govern in a way which is best for the people as a whole, it cannot ignore the fact that it is the successor government to the apartheid government and, as such, bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the claimants claim to represent.

7. The decision taken by Cabinet not to support the litigation was not taken lightly. The Cabinet only took this decision after an extensive discussion both at Cabinet committee level and in the full Cabinet in which I participated fully, The principal reason for the Cabinet's decision was that as the Mandela government in 1994 and the Mbeki government in 1999 were both elected by an overwhelming majority of the population, on a programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid, it would make little sense for the government to support litigation, which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up the claimants as a surrogate government Accordingly, on 16 April 2003, the Cabinet, after extensive discussion of the matter at Cabinet committee level, resolved that:

> **"It remains the right of the government to define and finalise Issues of reparations, both nationally and Internationally. In this regard, it is Imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions—such as the reparations lawsuit filed In the United States of America by a US lawyer, Mr. Ed Fagan, against two South African mining firms and the participation of South African lawyers in such procedures."**

8.

8.1 The government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution (**"Gear"**) strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and. that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.

8.2 The re-entry of South Africa to global capital and export markets post-1994, together with the government's exemplary fiscal and monetary policy record, have resulted in an increase in economic growth to 2.5% per annum from 1994-2002, compared. with the paltry below 1 per cent per annum growth of the previous decade. Importantly, private sector fixed investment has responded to the improved environment, rising some 4.3 per cent per annum since 1993.

8.3 The improved growth performance is still less than what is required to address successfully all the socio-economic legacies of apartheid—especially unemployment. But, together with the government's redirection of existing expenditure, it has enabled important progress to be made in addressing historical inequalities and poverty.

8.4 In addition to the government performance set out in 5, the recently released 2001 census, together with figures from the South African Reserve Bank, provide evidence of further important progress:

- real disposable income per capita of households (at constant 1995 prices) rose from R8 640 in 1994 to R9 271 in 2002, reflecting an increase of 7.3%;
- from April 1994 to February 2003, close on 1.5 million houses had either been built or were under construction with the help of the government's subsidy for low-income first-time buyers. The number of formal dwellings increased from 4.3 million in 1996 to 6.2 million in 2001, an increase of 44%. Further, formal houses constituted 48% of the total number of dwellings in 1996 and this proportion rose to 56% In 2001;
- the number of households using electricity for lighting increased from 5.2 million in 1995 to 7.8 million in 2001, an increase of 50%. While 57% of all households used electricity for lighting in 1996, this proportion had risen to 70% by 2001;
- the number of households with access to clean water increased from 7.2 million in 1996 to 9.5 million in 2001, an increase of 31%. As a result, by 2001 85% of all South African households had access to piped water within 200 metres of their homes;
- in 1996, the number of people aged between 5 and 24 who were studying at an educational institution was 11.8 million while in 2001 the number had risen to 13.7 million: an increase of 16%. The number of people aged 20 or over who have Grade 12 or have completed high school rose from 3.5 million in 1996 to 5.2 million in 2001, an increase of 50%.

9. The government accepts that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affeeted by apartheid. Over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1-billion (approximately US $133-million) Business Trust. Over five years, this business led initiative has improved the lives of 2.5 million disadvantaged South Africans through focused programmes of human capacity building and employment creation. Further initiatives in partnership between business and government, as well as other social actors, are being prepared with concrete commitments having been made in a number of fields at the government's June 7, 2003 Growth and Development Summit attended by leading representatives of government, business and labour. At the summit, business agreed with government and labour to 'invest R145 billion (US$19 billion) in the automotive, chemical, mining and oil sectors over the next five years.

10. The remedies demanded in the current litigation in the United States—both the specific requests (such as for the creation of a historical commission and the institution of affirmative action programmes) and the demand for billions of dollars in damages to be distributed by the US courts—are inconsistent with Soutl. Africa's approach to achieving its long term goals. In this regard, I refer further to the earlier discussion on the TRC and its establishment in 3.2. As indicated above, the government has its own views on appropriate reparations policies and the appropriate allocation of resources to develop our economy. I would also make the point that matters of domestic policy which are pre-eminently South African should not be pre-empted by litigation in a foreign court.

11. It is also the view of the government that the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved, not -least when these issues must be dealt with in South Africa. In addition, the continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.

12. Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, the litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment. One of the structural features of the South African economy, and one of the terrible legacies of apartheid, is its high level of unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

13. I understand that under United States law, courts may abstain from adjudicating cases in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the

United States, and where. adjudication in the United States would interfere with the foreign sovereign's efforts to address matters in which it has the predominant interest. The government submits that its interest in addressing its apartheid past presents just such a situation.

I declare, under penalty of perjury, under the laws of the United States, that the foregoing is a true and correct statement.

Signed on 11th July 2003.

/s/ Penuell Mpapa Maduna
PENUELL MPAPA MADUNA